



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 312 OF 2013

DANIEL KAMAU KARERAPLAINTIFF

VERSUS

CATHERINE WANGARI NYAGAH DEFENDANT

RULING

Coming up before me for determination is the Defendant's Notice of Motion dated 22/4/13 in which orders are sought to set aside the Interlocutory Judgment entered on 11th April 2013 and to grant the Defendant leave to file her defence.

The application is based upon the grounds appearing on the face of it and the Supporting Affidavit of Gachoka Mwangi sworn on 22/4/13. In it, he avers that on 18/3/13, his office received a letter from Kabarú & Company Advocates indicating that he had filed a suit against the Defendant. He further stated that he saw the letter on 20/3/13 when he immediately called the Defendant's father, Mr. David Nyagah Ndogoh who instructed him to file a defence on behalf of the Defendant.

He further indicated that he wrote to Kabarú & Company Advocates on the same day (20/3/13) to serve his office with Summons and the Plaint which letter was delivered on the same day. He stated further that his Court Clerk did not find Mr. Kabarú in office. He further indicated that Mr. Kabarú called him on 25/3/13 seeking to confirm whether he could serve him with Summons and he confirmed this can be done. He further averred that he was not served so he called Kabarú on 11/4/13. He further averred that Mr. Kabarú stated that he had spoken with Mr. Gachoka's Secretary who had indicated she would send somebody to collect the documents. Mr. Kabarú also stated that he had gone ahead to seek for Interlocutory Judgment. Mr. Gachoka further averred that he found that move odd bearing in mind that he had already disclosed to Mr. Kabarú that he had instructions to act for the Defendant. Upon speaking with the Defendant, Mr. Gachoka learnt that the Defendant was also not served. Mr. Gachoka maintained that he then wrote to the Court seeking permission to photocopy the documents on the court file as they had not been served. Mr. Gachoka also indicated that the Defendant has a good defence which raises triable issues and it is only prudent that the interlocutory judgment be set aside.

The application is further supported by the Supporting Affidavit of the Defendant sworn on 22/4/13 in which she confirmed that indeed

Mr. Kabarú visited her at her work place sometimes in March and said he had filed a suit in respect of her plot at Kimende. She further averred that she directed him to speak to her father and Mr. Gachoka Mwangi who is their advocate. She further averred that Mr. Kabarú said he would communicate with the Advocate Gachoka Mwangi. She denied having been shown or left with any court papers.

The application is contested. The Plaintiff filed their Grounds of Opposition dated 8/5/13 in which they sought to rely on the following grounds.

1. That the Interlocutory Judgment filed in this case was proper.
2. That the Defendant was properly served with the Complaint and Summons.
3. That in denying service, the Defendant obviously lied.
4. That the Defendant's advocate did not explain why he was not able to obtain copies of the pleadings from the court file.
5. That the Defendant has not even offered to pay throw away costs as a precondition of having the Judgment set aside.
6. That the application lacks merit and should be dismissed with costs.

Order 10 Rule 11 of the Civil Procedure Rules provides as follows:-

“Where Judgment has been entered under this order the court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just.”

Looking at the chronology of events in this matter, I have noted that Mr. Kabaru, the Plaintiff's Advocate set the ball rolling when he filed this suit on his client's behalf on 1st March, 2013. He made an attempt to serve the Defendant personally at her work place but she declined to accept service but directed him to her lawyer Mr. Gachoka Mwangi. Indeed, Mr. Kabaru subsequently wrote to Mr. Gachoka by his letter dated 18/3/13 wherein he disclosed that he had filed suit against the Defendant and that he had attempted to serve the Defendant but she declined to accept service. In that same letter, Mr. Kabaru disclosed that he would apply for Interlocutory Judgment and advised Mr. Gachoka to collect the documents from his office or the court. Mr. Gachoka wrote Mr. Kabaru his letter dated 20/3/13 which he says was delivered to Mr. Kabaru on the same date. In that letter, Mr. Gachoka stated that he had instructions to accept service on behalf of the Defendant and requested Mr. Kabaru to serve him. This was not done. Mr. Kabaru did call Mr. Gachoka thereafter on 25/3/13 asking him whether he could serve him and Mr. Gachoka confirmed that he could do so. Mr. Kabaru did not serve him. Instead, on 8/4/13, Mr. Kabaru proceeded to file an Affidavit of Service and a Request for Interlocutory Judgment. Mr. Gachoka was forced to resort to making photocopies of the documents on the court file as to date, Mr. Kabaru has never served him at all.

I am quite perturbed that Mr. Kabaru, knowing fully well that Mr. Gachoka had instructions to act on behalf of the Defendant, failed to serve him at all and instead moved to request for Interlocutory Judgment. In the Circumstances, I do not agree that the Interlocutory Judgment filed in this case was proper. While I do believe that Mr. Kabaru did try to serve the Defendant personally but she declined to accept service, I find that Mr. Kabaru was directed to serve Mr. Gachoka Advocate which Mr. Kabaru failed, without any good excuse, to do. I find that Mr. Gachoka was forced to make photocopies of the document from the court file after Mr. Kabaru had deliberately refused to serve him.

In light of the foregoing, I find that the Plaintiff is not entitled to the Interlocutory Judgment entered in this matter on 11/4/13 and I hereby set it aside.

Accordingly, I hereby allow this application with costs to the Defendant/Applicant.

SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF AUGUST 2013.

MARY M. GITUMBI

JUDGE